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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1071

L. E. CARPENTER AND MARGARET CARPENTER,
Petitioners,

vs.

TITLE INSURANCE AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

A. L. WIRIN,
Counsel for Petitioners.

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A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of Matter Involved

The petitioners are citizens of the United States and plaintiffs in a suit at law brought in the Superior Court of Los Angeles County, State of California, for damages against respondent for breach of contract obligations as trustee under a deed of trust with respect to the real prop-

erty of petitioners. The suit was based upon the grounds pleaded in the complaint (R. 8-25) that the trustee wilfully failed to perform the express terms of the trust deed. The complaint alleged the trust deed and incorporated it (R. 16). Unknown to petitioners, the beneficiary under the trust deed elected to declare a default under said instrument and gave notice to the trustee (R. 22) and the trustee acting under his powers as such recorded it. Under the terms of the trust deed, the trustee had a mandatory duty to give notice to petitioners (R. 10-11) but the trustee, respondent herein, failed to do this. Petitioners did not have notice of this fact and certain others until several years later. Subsequently the trustee in violation of the terms of the trust deed failed to proceed with the sale of the home of petitioners and failed to give petitioners notice of an attempted rescission and withdrawal of the notice of default by the beneficiary (R. 20) as required under the terms of the trust deed.

Subsequently the beneficiary instituted a foreclosure suit in the Los Angeles Superior Court to foreclose by judicial action the real property of petitioners. This was done although no provision for such suit was provided for in the trust deed and was contrary to its provisions which required the trustee to proceed with the sale after the notice of default was recorded. In said suit the respondent herein was made a party defendant but made no defense. The plaintiff therein was the beneficiary under the trust deed while petitioners were defendants. Petitioners were thus compelled to engage attorneys to defend the action at great expense. As a result of said suit the property was foreclosed under sec. 725 (a) of the California Code of Civil Procedure (for copy of this section see Point Three of Argument in Brief). By said foreclosure relying on said statute, the obligation of the contract in which respondent

was trustee was impaired. The federal questions were raised in the complaint (R. 14-15). In the present suit petitioners claimed damages in the sum of $13,723.46 as a result of the trustee's actions and failure to act and the loss of their home.

The Los Angeles Superior Court sustained a demurrer to petitioners' complaint (R. 31) without leave to amend the complaint and thus deprived petitioners of a trial on the merits. This judgment was appealed from to the District Court of Appeal which rendered an opinion against petitioners (R. 34), *Carpenter* v. *Title Insurance and Trust Co.*, 71 A. C. A. 783. Petitioners petitioned for a rehearing but this was denied (R. 38). This appeal was to the highest court in California as of right. A petition for hearing was directed to the Supreme Court of California, but said Court rendered an Order in its Minutes of January 7, 1946, denying a hearing. The minutes are found in 27 A. C. No. 16, p. 1 of Minutes. The judgment of the District Court of Appeal is the final judgment of right in California.

The principal questions involved on said appeal were that the terms of the trust deed were not carried out by the trustee to plaintiffs' damages, that the Superior Court in sustaining the demurrer was relying on a statute which impaired the obligation of petitioners' contract, that it was denying petitioners due process in not giving effect to the lack of notice to petitioners. These questions materially affected the determination of the appeal (see opinion of the appellate court, R. 34).

II

Reasons Relied On for the Allowance of the Writ

1. The federal questions, of substance and not theretofore determined by this Court, as to the impairment of the obligation of the contract involved and the denial of due

process to petitioners was decided by said Supreme Court of California and the District Court of Appeal of said state in favor of respondent by holding that respondent was not bound by the terms of the trust deed but could rely on a statute of California, sec. 725 (a) Cal. C. C. P., to relieve it of its duties thereunder. The District Court of Appeal and the Supreme Court had the federal questions presented to them and they were raised in the complaint and also in the briefs and petitions.

WHEREFORE petitioners pray that this Court issue a Writ of Certiorari to review the judgment of the District Court of Appeals, Second Appellate District of the State of California.

Respectfully submitted,

A. L. WIRIN,
Counsel for Petitioners.